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Supreme Court of the United States

No. [redacted]100

October Term, 1961

MILTON J. HARRIS

Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees,

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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No. 930

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Appellant,

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THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees,

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Appellant, MILTON J. HARRIS, in the above entitled cause files his Brief in Opposition to Motion to Dismiss or Affirm, by Appellees, FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.

1. No Sufficient Predicate for Appellees' Motion To Dismiss or Affirm Because Florida Supreme Court's Bare Majority Reversal Opinion (4-3) Avoided Federal Questions, By Putting Forward Non-Federal Grounds of Decision Which Are Without Any Fair or Substantial Support. The Minority Opinion Affirmatively So Indicates.

The Supreme Court of Florida is composed of seven Justices, three of whom (long in point of service) Mr. Justice Terrell, Mr. Justice Hobson and Mr. Justice Thomas dissented. The dissenting written opinion by Mr. Justice Thomas was concurred in by the other two Justices, which opinion in no unmistakable words affirmatively indicates that the constitutional question was avoided by the majority.

The minority opinion is so succinct in this regard and so highly applicable to affirmatively show that Appellees' grounds contained in their Motion to Dismiss or Affirm are absolutely without foundation, that we take the liberty of setting out the dissenting minority opinion of Mr. Justice Thomas emphasizing those portions which we believe sustain our contention, and we believe in doing so we also avoid the elongation of this brief.

(MINORITY OPINION IN **FLORIDA REAL ESTATE COMMISSION VS. HARRIS**, 134 So. 2nd text 790 and 791).

"TERRELL, THOMAS and HOBSON, JJ., dissent.

THOMAS, Justice (dissenting)."

"The opinion begins with the statement that the appeal has come direct to this court under the provisions of Sec. 4(2), Art. V of the Constitution and Rule 2.1, subd. a(5) (a), Florida Appellate Rules, that such an appeal may be taken to this court "as a matter of right" from a judgment or decree directly determining the validity of a state statute.",

The opinion ends with the declaration that because of the attitude toward other features of the litigation the court is precluded "from passing upon the validity of the questioned statute." With such a position I cannot agree.

There can be no doubt from the simple wording of the constitutional guaranty that a right of appeal to this court vests in a litigant the moment a judgment or decree is entered judging the validity or invalidity of a state statute. My concern is with the duty of this court once the case arrives here. It seems to me inconsistent to recognize the appeal from such a judgment or decree as a vehicle to bring into play the power of this court to review and then to discard the basic question as unnecessary of decision and adjudicate other issues which, without the basic question would be matters for decision by District Courts of Appeal.

Of course, the constitutional question must be substantial. Evans v. Carroll, Fla., 104 So. 2d 375. If found to be merely colorable, as in that case, the matter will be transferred to the District Court of Appeal. The order of the cited case is significant here: "All other points raised relate to matters within the ordinary appellate jurisdiction of the district courts. In accord with 31 F.S.A. Rule 2.1, subd. a(5) (d), Florida Appellate Rules (provid-

ing for transfer of a cause to the appellate court having jurisdiction where the jurisdiction of another appellate court has been improvidently invoked the notice of appeal and all other papers filed herein shall at the expiration of five days from the filing of this opinion be transferred to the District Court of Appeal of Florida, Second District."

So in the cited case, the court decided that as the constitutional question was colorable the case would be transferred to the District Court of Appeal which had jurisdiction to determine all other issues; in this case all other issues are entertained although the constitutional question need not even be decided. A comparison of the reasoning in the cited and present cases brings the strange result that the court will shun a case in which the constitutional question is colorable and embrace one in which such a question is nonessential.

For scores of years, it was a familiar rule that a court would not pass upon the constitutionality of an act unless it was necessary to a disposition of the case. But this rule seems now to be inapposite because of the respective jurisdictions of the Supreme Court and the District Courts of Appeal as defined in the amendment of Article V of the Constitution, effective 1 July, 1957.

Before that time a case like this would have come here with or without a direct ruling on the constitutionality of a statute so that if a decision of that question was declined, the jurisdiction to dispose of other questions would not be disturbed. Now the system is quite different because in the absence of a substantial constitutional question of the kind defined in the Constitution, the

jurisdiction of this Court cannot attach and the power to determine related matters is exclusively that of the District Courts of Appeal.

Perhaps the opinion of the court on the issues irrespective of the basic constitutional jurisdictional question is correct, but I cannot agree that the court can discard that question and retain jurisdiction of the other matters which without it fall within the jurisdiction of the District Court of Appeal.

I cannot agree that the jurisdictional feature now said to be irrelevant can be used at once to vest jurisdiction in this court and divest the District Court of Appeal of the power that tribunal exercises by virtue of express provision of the Constitution. In my opinion, if this court decides that the question so lacks relevancy that it should be disregarded then the power of this court ceases and an attempt to go further amounts to usurpation of the power of the District Court of Appeal.

In sum, it is my conviction that this court should either pass upon the ruling dealing with the constitutionality of the act in question or transfer the case to the District Court of Appeal where it belongs.

I dissent.

TERRELL and HOBSON, JJ., concur."

It seems to the writer of this brief that the Appellees' only make a weak cry in the dark when they pit themselves against the written pronouncement of three venerable Justices of Florida's highest Court, and par-

ticularly is this true and applicable to the case at bar when in the very decision cited by the Appellees in their Motion to Dismiss or Affirm (Page 8) (**Wolfe vs. North Carolina,** 364 U. S. 177, 4 L ed. (2) 1650, 80 S.C. 1482) this Court (text 1487) stated:

> **"It is settled that a state court may not avoid deciding Federal questions and thus defeat the jurisdiction of this court by putting forward non-federal grounds of decision which are without any fair or substantial support."** (Emphasis ours)

2. The Bare Majority Reversal Opinion of The Supreme Court of Florida In Effect Upheld The Constitutionality of The Statute Which the Lower Court Declared Unconstitutional.

The bare majority reversal opinion of the Supreme Court of Florida, so far as the Appellant is concerned, upheld the constitutionality of the statute which the Circuit Court held unconstitutional, and forever set at rest the constitutionality of the statute as to him. There is no proceeding which could be taken by Appellant under State Law to attack the constitutionality of the statute after the pronouncement by the Supreme Court of reversal and dismissal of the complaint. It is submitted that what you cannot do directly you should not be able to do indirectly. The majority opinion of the Supreme Court of Florida, for all practical purposes, was a decision upholding the constitutionality of a statute which the Circuit Court held unconstitutional under both State and Federal Law. (See Appellant's Appendix A, pages 2 to 14)

3. A Written Notice of Appeal Filed in the Lower Court Without Naming, and Entirely Omitting To Name Any Appellate Court (Especially Where One Can Appeal to More Than One Court) Is a Nullity and Violative of the Due Process Clause.

Appellees' attach as Appendix A1 copy of Appellant's (Appellee in the Supreme Court of Florida) Motion to Recall the Mandate of the Supreme Court of Florida, but fail to attach a copy of the Notice of Appeal which was attached as an exhibit to said Motion. Appellant supplies this omission in this brief and labels the omitted Notice of Appeal Appendix 1.

It is to be noted that the Notice of Appeal is filed in the Circuit Court of Dade County, Florida, which court entered the Final Decree declaring the unconstitutionality of the attacked statute.

The Notice of Appeal entirely omits to name any Appellate Court. It is our contention that the failure to name any Appellate Court in any Notice of Appeal under any system of jurisprudence in the United States, either State or Federal, is a nullity, and does not afford due process. The naming of an Appellate Court to which an appeal is taken is a jurisdictional feature.

The provisions of the statute of Florida regarding appeals makes the naming of the Appellate Court mandatory, and well it should be. The naming of an Appellate Court in any appeal to give jurisdiction on appeal in any State or Federal Court, we submit is a necessary predicate to give jurisdiction, and to comply with due process.

The Appellees herein (the Appellants in the court below) in failing to name any Appellate Court to which they took their appeal, in effect, made no appeal, and the hearing of an appeal based on such a null and void Notice of Appeal did not afford due process. It is submitted that under these circumstances, whether due process has been adhered to, is squarely before this court.

Suppose Appellant had filed their present Notice of Appeal with the Supreme Court of Florida to this Court without setting out that the appeal was taken "to the Supreme Court of the United States" this Court would certainly hold the appeal a nullity. Such an omission is and should be fatal.

The dearth of decisions on the precise point shows the rarity of such an omission, but the necessity to name the Appellate Court is **glaringly obvious.**

CONCLUSION

The Circuit Court's Final Decree adjudicated as unconstitutional and void under State and Federal Law Sec. 475.25 (2) F.S.A. Florida Real Estate Brokers' Act and enjoined the carrying out the revocation of Appellant's Real Estate Broker's License by Appellees which revocation order was entered pursuant to the mandatory provisions of said Act requiring revocation **if holder is confined in any State or Federal prison**; this final decree was appealed by Appellees direct to the Florida Supreme Court (bypassing the District Court of Appeal) under constitutional provisions allowing a direct appeal to the Florida highest Appellate Court, where the validity of a State or Federal Statute or construing a controlling provision of Florida or Federal Constitution, was involved; the Supreme Court avoided passing upon the constitutional question which was directly before it; three dissenting Justices affirmatively indicated in the written minority and dissenting opinion that the bare majority opinion of reversal containing a direction for dismissal of the complaint in the lower court upon which the final decree was predicated, avoided the constitutional question.

Substantial Federal Questions are involved. A mandatory provision, in a statute requiring revocation of a license **for mere confinement** clearly violates the constitution of the United States. (See Appellant's Jurisdictional Statement, pages 18 to 21 inclusive).

It is therefore submitted that Appellee's Motion to Dismiss or Affirm is not sufficient for this Court to deny plenary consideration with briefs on the merits and oral argument for the solution of the constitutional questions involved.

To avoid repetitions, we respectfully refer the Court to our jurisdictional statement and decisions cited therein as well as Appendix A and B.

Respectfully submitted,

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PROOF OF SERVICE

I, M. H. ROSENHOUSE, of counsel for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of June, 1962, I served four copies of the foregoing Appellant's Brief In Opposition To Appellees' Motion to Dismiss Or Affirm together with the Appendix, by mailing said copies in a duly addressed envelope, with sufficient United States airmail postage prepaid to: Benjamin T. Shuman, General Counsel, Florida Real Estate Commission, State of Florida Office Building, West Morse Boulevard, Winter Park, Florida; and depositing same in a United States post office or mail box at Miami, Florida.

M. H. Rosenhouse
Of Counsel for Appellant

I hereby acknowledge receipt of four copies of the foregoing Jurisdictional Statement on this the ____ day of June, 1962.

BENJAMIN T. SHUMAN,
General Counsel
Florida Real Estate Commission
State of Florida Office Building
West Morse Boulevard
Winter Park, Florida

By _____
BENJAMIN T. SHUMAN

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA — IN CHANCERY NO. 59 C 11355.

MILTON J. HARRIS,

Plaintiff

vs.

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida and ROBERT T. BRINKLEY, Chairman, JAMES R. BORING, Vice-Chairman, and SYLVAN M. MAXWELL, Commissioner, As and Constituting the Members of the Said Commission,

Defendants,

NOTICE OF APPEAL

The Defendants, The Florida Real Estate Commission, Robert T. Brinkley, James R. Boring and Sylvan M. Maxwell, take and enter their appeal from the Final Decree entered by the Honorable George E. Holt, in above styled cause, on the 11th day of July, A. D. 1960, recorded in Chancery Order Book 1460, Page 49, public records of Dade County, Florida,

and all parties to said cause are called upon to take notice of the entry of said appeal.

S/ BENJAMIN T. SHUMAN.
Benjamin T. Shuman
Attorney for Defendants
State Office Building
West Morse Boulevard
Winter Park, Florida

I certify that I mailed a copy of the foregoing Notice of Appeal to Julius Jay Perlmutter, Esquire, 407 Lincoln Road, Miami Beach, Florida, Attorney for Plaintiff, by U. S. Mail, this 6th day of September 1960.

S/ BENJAMIN T. SHUMAN
Benjamin T. Shuman

BTS/k e